Economists demonstrate that some mobile services act as effective substitutes for one another. In a study prepared for CTIA and submitted with its PCS Comments, Dr. Stanley M. Besen, Dr. Robert J. Larner and Dr. Jane Murdoch of Charles River Associates ("Besen et al.") find that ESMR serves as a competitive alternative to cellular service and that certain applications of PCS may also serve as competitive substitutes.[51] Besen et al. explain that the consolidation of radio frequencies, digital technology, multiplexing technology and multiple base stations will increase ESMR's capacity greatly, expand its service offerings and improve its quality.[52] Dr. Jerry A. Hausman, MacDonald Professor of Economics at the Massachusetts Institute of Technology, also has predicted that ESMR "will provide a close substitute to cellular service and will increase overall competition" and that PCS may have a similar capability.[53]

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[51] See Besen et al., Charles River Associates, "An Economic Analysis of Entry By Cellular Operators Into Personal Communications Services," submitted as an Appendix to CTIA Comments in Gen. Docket 90-314, at 37-38 and generally (November 1992).

[52] Id. at 37-38.

[53] See Affidavit of Jerry A. Hausman, United States v. W. Elec. Co., Inc., Civil Action No. 82-0192 at 15-16 (July 29, 1992) ("Hausman affidavit"); see also Anthony Ramirez, A Challenge to Cellular's Foothold, N.Y. Times, April 1, 1993, at C1, C5 (ESMR viewed as a powerful potential competitor to cellular); Andrews, Radio Dispatchers Set to Rival Cellular Phones, supra, at D4 (Nextel "plans to compete directly against cellular companies"); Cheryl A. Tritt, Written Statement in the Hearing Before the California Legislature Senate Committee on Energy and Public Utilities (Jan. 12, 1993) ("Advances in digital (continued...)

Communications consultants reach similar conclusions. In a December, 1992, analysis presented to CTIA, EMCI, Inc., observes that continuing changes in technology, regulation and market structure will permit paging, SMR, cellular, mobile data and mobile satellite services to compete with one another, and in some instances provide cost-effective substitutes. For example, SMR will grow from primarily dispatch to include interconnected voice services. Paging will continue its evolution into two-way messaging and voice service. And high capacity digital SMR and paging systems employing frequency reuse can provide services similar to cellular. A variety of mobile services can be supplied over the same equipment, including voice and data applications. IBM has, for example, designed "Simon," a fully integrated, hand-held cellular phone, wireless facsimile machine, pager and data communicator. Bell Atlantic Mobile also recently announced that it will offer one-stop cellular and paging capabilities beginning later this month. The EMCI Report also predicted that PCS would provide additional forms of competitive wireless services.[54] In sum, these services belong in a broad mobile services category.

In addition, under a customer perception, or demand-side, analysis of functional equivalency, consumers easily could substitute cellular, SMR and certain PCS services (assuming that

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[53](...continued)
technology will allow SMR to develop cost-effective services that are likely to compete directly with cellular.")

[54] See EMCI Study, supra, at 3-8.

some PCS capacity will be devoted to "cellular-like" services) to satisfy their needs for mobile communications. Demand for these and other services is growing. Currently, over 25 million people use cellular, paging and SMR -- services which are already expanding and evolving in the competitive marketplace. EMCI, Inc., estimates that the number of wireless service users will grow to over 60 million by the year 2000.[55] If such services provide consumers with dial tone so that they may send and receive messages, the customer may likely be satisfied. As the industry continues to grow and develop, the transparency of the network will become increasingly more prevalent.

The ability of these services to continue to develop and respond to customer needs and technological advances in optimally efficient ways will in part be determined by the regulatory environment. This is the fundamental insight of the new § 332, and it must guide the Commission's implementation here. A regulatory scheme that uniformly applies to a full range of current and future mobile services will remove the artificial constraints and inefficiencies created under prior regulations.

### 3. Commercial mobile service providers should be allowed to offer dispatch services

The Budget Act contemplates that common carriers may not provide dispatch services on common carrier frequencies, but it creates an exception for newly-reclassified commercial mobile

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[55] See CTIA Cellular Paper, supra.

services.[56] It also permits the Commission to terminate this restriction on providing dispatch if "such termination will serve the public interest."[57] The Notice requests comment upon whether the restriction on dispatch should be removed.[58]

CTIA submits that in making its public interest determination under the Budget Act, the Commission should be guided by the fundamental principle that similarly classified services (i.e., all commercial mobile services) should be permitted to offer the same services. As a matter of competitive necessity and in the interests of fairness, the restriction on dispatch should be removed.[59] If dispatch is permissible for a reclassified commercial mobile service provider, it should be permissible for all similarly regulated providers, including cellular.

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[56] See 47 U.S.C. § 332(c)(2); Conference Report at 492; House Report at 261 ("The intent of the Committee is not to disturb the ability of private carriers offering dispatch service prior to enactment from continuing to offer such service.")

[57] See 47 U.S.C. § 332(c)(2); Conference Report at 492 ("this section authorizes the FCC to decide whether all common carriers should be able to provide dispatch service in the future").

[58] Notice at ¶ 42.

[59] Cellular providers are currently able to provide switched "dispatch" service under the Commission's rules. See 47 C.F.R. § 22.930 (provides cellular operators with service flexibility); § 22.2 (defines dispatch communication to include communications that are transmitted "between a dispatcher and one or more land mobile stations, directly through a base station, without passing through the mobile telephone switching facilities"). Thus, CTIA is requesting that all commercial mobile service operators be allowed to provide "traditional" dispatch.

#### 4. The private mobile services category is necessarily narrow

Private mobile services, on the other hand, would include non-profit services, or non-interconnected services (i.e., services outside the definition of commercial mobile services) so long as they are not functional equivalents to commercial mobile services. Examples under amended § 332 would include certain services authorized under Part 90 of the Commission's rules (e.g., Petroleum Radio Service, Police Radio Service).

## III. COMMERCIAL MOBILE SERVICES SHOULD BE SUBJECT TO MAXIMUM REGULATORY FORBEARANCE

### A. Congress Recognized The Significant And Burdensome Costs Imposed By Stringent Adherence To The Traditional Common Carrier Regulatory Scheme

Because of the competitive nature of the mobile services market, maximum regulatory forbearance is required as a matter of law and policy. As demonstrated below, common carrier regulation is designed principally to protect against market power, a condition not present in the mobile services marketplace. Congress recognized that regulatory forbearance for the mobile services will foster competitive development, and thus it provided the Commission with the mechanisms to remove unneeded constraints. The Commission, in its forbearance analysis, should recognize the competitive nature of the mobile services market and act accordingly.

The imposition of common carrier obligations upon a service imposes significant costs which should be avoided if market

forces make such regulation unnecessary or even anticompetitive. This underlying policy is grounded in the indisputable recognition that unnecessary regulation of market entry and pricing may actually serve to undercut the competitive process, and thereby create inefficiency and diminish consumer welfare. A brief explanation of the history of common carrier regulation illustrates why this is so.

The principles of common carriage regulation evolved from the common law recognition of the need to protect the public from the arbitrary and deliberate exercise of monopoly power in the hands of those controlling essential services.[60] Thus, for example, the sole innkeeper in a medieval English village who provided services upon which travelers were utterly dependent was precluded from exploiting his virtual monopoly over these services. As time progressed, various services that had been subject to a duty to deal in the fifteenth century (e.g., smiths, tailors, surgeons) were relieved of such duties by the nineteenth century as their services became available from multiple sources.[61] "In other words, the basic approach of the common law was to impose the duty to serve indiscriminately upon certain occupations particularly likely to abuse the public if no legal protection were extended."[62]

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[60] See generally, Competitive Carrier Rulemaking, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 520-34, Appendix B, "Definition of Common Carrier Common Law Background" (1981).

[61] Id. at 521.

[62] Id. at 522.

The government facilitates the beneficial interplay of market forces when it seeks to confine such harsh, inflexible regulation -- at both the federal and the state level -- to circumstances in which monopoly power can otherwise be exploited to the public detriment. This effort should be made not only because the application of public utility regulation to companies lacking market power is unnecessary, but because it is affirmatively harmful to regulatees and the consuming public. For example, prior review of investment and pricing decisions inhibits competitive carriers' ability to respond rapidly and efficiently to changes in demand and in costs. Publication of prices impairs price competition and indeed may facilitate price collusion.[63] Requirements to expose plans for new construction, and especially new technologies applications, inhibit those innovations themselves by requiring innovators to share their plans with competitors and precluding them from capturing the

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[63] See Tariff Filing Requirements for Interstate Common Carriers, Report and Order in CC Docket 92-13, 7 FCC Rcd. 8072, 8073 (1992), citing Competitive Carrier Rule Making Notice of Inquiry and Proposed Rule Making, 77 FCC 2d 308, 358-359 (1979) ("traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually would be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing."); Tariff Filing Requirements, id., at 8079 ("mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends"); Cellular Telecommunications Industry Association Petition for Waiver of Part 61 of the Commission's Rules, Order, 8 FCC Rcd. 1412, 1413 (1993) ("cost support materials might provide competitors with access to information that is completely sensitive").

full rewards of their risk investment. Finally, the direct costs of needless regulation, borne by both the regulated firms and taxpayers in general, represent substantial waste.

As previously demonstrated in these comments,[64] Congress recognized that § 332 created regulatory disparities among the mobile services that necessitated correction. In addition, it recognized that recent events in the judicial arena also spurred the need for immediate Congressional relief.[65] As a result of AT&T v. FCC,[66] the Commission's longstanding policy of permissive detariffing was held to be ultra vires under § 203(a) of the Act.[67]

In amending § 332, Congress established "uniform rules" to govern all commercial mobile service offerings "to ensure that all carriers providing such services are treated as common carriers under the Communications Act of 1934."[68] It determined, however, that it was only necessary to preserve the "key principles" of common carriage such as "nondiscrimination" and to

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[64] See supra, section II.A.

[65] See House Report at 260.

[66] 978 F.2d 727 (D.C. Cir. 1992).

[67] 47 U.S.C. § 203(a). The AT&T court made clear that the Commission would "have to obtain congressional sanction for its desired policy course" if it wished to continue its tariff forbearance policies. AT&T, 978 F.2d at 736.

[68] See House Report at 259. See also Conference Report at 490 (the intent of § 332(c)(1)(A) "is to establish a Federal regulatory framework to govern the offering of all commercial mobile services").

permit some "minimal state regulation."[69] Thus, it protected the Commission's retention of the basic "authority to protect consumers and apply regulations in a sensible fashion," while at the same time permitting the Commission "authority to specify by rule which provisions of title II may not apply."[70] It also preempted state rate and entry regulation of commercial mobile services to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[71]

The Budget Act provides the test to determine which provisions of Title II should be forborne. Specifically, the Commission must find that:

> (i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (ii) enforcement of such provision is not necessary for the protection of consumers; and

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[69] See Markey Statement, supra.

[70] House Report at 260; Markey Statement, id. Congress, though, prohibits the Commission from removing the restrictions found in sections 201, 202 and 208 of the Act, 47 U.S.C. § § 201, 202, 208.

[71] House Report at 260. See also Section 4002 of the Senate Amendment, Finding No. 13 ("because commercial mobile services require a Federal license and the Federal Government is attempting to promote competition for such services, and because providers of such services do not exercise market power vis-a-vis telephone exchange service carriers and State regulation can be a barrier to the development of competition in this market, uniform national policy is necessary and in the public interest").

(iii) specifying such provision is consistent with the public interest.[72]

In making the public interest determination under (A)(iii), the Commission is required to consider "whether the proposed regulation . . . will promote competitive market conditions, including the extent to which such regulation . . . will enhance competition among providers of commercial mobile services."[73]

In light of the competitive nature of the commercial mobile services market, all commercial mobile services should be freed from tariff obligations and all other unnecessary regulatory constraints.

### B. At A Minimum, All Commercial Mobile Service Providers Should Be Relieved From Tariffing Obligations

The record in this proceeding clearly demonstrates that commercial mobile services are operating in a competitive environment. This competition necessarily bars firms from engaging in unjust or unreasonable pricing and from "harming" mobile services consumers. As demonstrated below, for these reasons, tariff obligations should be removed for all mobile services providers.

The Notice tentatively concludes,[74] and CTIA concurs, that the commercial mobile services includes three basic categories: (1) common carrier mobile (e.g., cellular); (2) certain PCS

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[72] 47 U.S.C. § 332(c)(1)(A).

[73] Id. at § 632(c)(1)(C).

[74] See Notice at ¶ 55.

services; and (3) reclassified private mobile services. Each of these categories should be freed from tariff obligations imposed by § 203 of the Act[75] and should otherwise be subject to consistent regulatory treatment. While the FCC has the authority to impose differential regulation on the various categories of commercial mobile service providers,[76] the record demonstrates that any differentiation is not only unnecessary, but indeed, counterproductive.

CTIA has already developed an extensive record which demonstrates the competitive nature of the mobile services market. In light of the AT&T decision, CTIA filed a petition for rulemaking specifically requesting the Commission to clarify the cellular service's tariffing requirements and to declare all cellular carriers as non-dominant and subject them to streamlined tariff filing procedures.[77] Comments were accepted on the petition and a comprehensive record demonstrating the significant level of competition in the market and the concomitant need for regulatory relief was developed.[78]

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[75] 47 U.S.C. § 203.

[76] See 47 U.S.C. § 332(c)(1); see also Conference Report at 491 ("Differential regulation of providers of commercial mobile services is permissible but is not required in order to fulfill the intent of this section.") (emphasis added).

[77] See CTIA Request for Declaratory Ruling and Petition for RuleMaking, RM 8179 (January 29, 1993).

[78] Only the National Cellular Resellers Association ("NCRA") opposed CTIA's petition. See NCRA Comments in RM 8179 (March 19, 1993). On September 1, 1993, CTIA requested that the Commission eliminate the federal tariff obligations applicable to (continued...)

The Notice itself tentatively concludes "that the level of competition in the commercial mobile services marketplace is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services provided to end users."[79] It also notes that the "record filed in response to the CTIA petition supports our tentative conclusion that commercial mobile services may be sufficiently competitive to permit us to forbear from regulating the rates for these services. This tentative conclusion is buttressed by the coming entry of new PCS commercial mobile service providers."[80]

CTIA agrees with the Commission's conclusion, not only because it will relieve the industry of burdensome filing requirements (and the Commission from costly monitoring functions) but also because such action was specifically contemplated by Congress.[81] As demonstrated in the comments filed in support of the petition and in CTIA's ex parte presentation, and in numerous economic analyses, the cellular consumers will be best served by such action.

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[78](...continued)
cellular carriers. See CTIA, Ex parte written presentation in RM 8179 (September 1, 1993).

[79] Notice at ¶ 62. By use of the phrase "end users" CTIA assumes that the Commission was simply describing that all commercial mobile services tariffs, regardless of whether they are provided to end users or resellers, would be subject to forbearance.

[80] Id. at ¶ 63.

[81] See, e.g., House Report at 260 (the Commission may specify that "the commercial mobile services need not be tariffed at all.")

### 1. The mobile services market is competitive

The commercial mobile services marketplace is already competitive and the promise of additional mobile services will only serve to increase competition. The Commission has already adjusted its regulatory treatment of paging and SMRs to account for their competitive nature. Similarly, economic experts have documented the competitive nature of cellular services, i.e., that "the business of supplying cellular telephone communications has been characterized by rapidly increasing volume, declining prices, expanded service offerings, and significant technological change."[82] Cellular, paging and SMR currently compete in the mobile services marketplace, and additional services such as ESMR, satellite mobile services and PCS will provide potentially strong competitive options.[83] Commenters on the CTIA cellular rulemaking petition support these conclusions.[84] Thus, as

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[82] See Besen et al., Charles River Associates, "The Cellular Service Industry: Performance and Competition," submitted as an Appendix to CTIA Reply Comments in Gen. Docket 90-314, at 1 (January 1993); see also Hausman affidavit, supra, at 7, 9-14 (competitive forces operate in the cellular market; there is a high degree of quality and price competition; market shares fluctuate; absence of rigorous state regulation); John Haring and Charles L. Jackson, Strategic Policy Research, "Errors In Hazlett's Analysis of Cellular Rents," at 1 (September 10, 1993) (conclusions made by Dr. Thomas W. Hazlett are wrong; evidence gathered can "be completely consistent with competitive behavior.") ("Haring et al. Study"); CTIA, The ABCs of Cellular Competition (1993) (documents how cellular competes on price and service features, and in a larger mobile market).

[83] See supra, section II.D.2.

[84] See, e.g., CTIA Petition at 17-20; McCaw Cellular Communications, Inc. Comments at 3-8 ("McCaw"); GTE Mobile Communications, Inc., GTE Mobilnet Inc. and Contel Cellular Inc. Comments at 2-10 ("GTE"); BellSouth Comments at 4-5.

demonstrated by the record, the marketplace for commercial mobile services is competitive.

### 2. Commercial mobile service operators do not possess market power

It is also well documented that commercial mobile service providers lack market power, i.e., the ability to raise price by restricting output. Commenters on the CTIA rulemaking petition reach this conclusion for cellular services,[85] with verification from economists[86] and the courts.[87] Paging services have also been found to lack market power.[88] Without market power, such providers are unable to engage in unreasonable and/or discriminatory pricing behavior otherwise prohibited by § 332. Of course, to the extent that problems arise in the future, the complaint procedures found in § 208 of Title II,[89] will ensure that the public interest is adequately protected.

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[85] See CTIA Reply Comments at 20-24; CTIA ex parte presentation at 9-12; McCaw Comments at 9-11; GTE Comments at 12-14.

[86] See Haring et al. Study, supra, at 1 ("rents in cellular telephony can only reflect scarcity of spectrum rather than market power").

[87] See Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 892 F.2d 62 (9th Cir. 1989); Metro Mobile CTS, Inc. v. NewVector Communications, Inc., 661 F. Supp. 1504 (D. Ariz. 1987).

[88] Preemption of State Entry Regulation in the Public Land Mobile Services, Report and Order in CC Docket 85-89, 59 R.R. 2d 1518, 1533 (1986).

[89] 47 U.S.C. § 208.

### C. Other Unnecessary Common Carrier Obligations Should Also Be Removed

For the same reasons detailed above, CTIA concurs with the Notice's tentative conclusion to forbear from applying sections 210 (franks and passes), 212 (interlocking directorates--officials dealing in securities), 213 (valuation of carrier property), 215 (equipment and services transactions), 218 (management inquiries), 219 (annual and other reports), 220 (accounts, records and memoranda; depreciation charges) and 221 (special telephone company provisions)[90] of Title II upon commercial mobile service providers.[91] The costs of ensuring compliance for these regulations are large measured against any concomitant protections afforded the consumer, if any. In addition, such requirements are inconsistent with a regulatory regime which refrains from regulating rates.[92]

As the Commission recognizes, these sections concern matters of Commission authority and specific obligations placed upon carriers which do not directly protect consumers from unjust rates or other similar harms. In light of the competitive nature of the market, such obligations are not necessary to achieve

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[90] 47 U.S.C. § § 210, 212, 213, 215, 218, 219, 220 and 221.

[91] See Notice at ¶ ¶ 65-66.

[92] See CTIA Petition for Waiver of Part 61, supra, 8 FCC Rcd. at 1413 ("the administrative burdens that would be imposed on the cellular industry in forcing its members to comply with technical form and content rules is substantial when measured against the minimal need to enforce technical compliance with tariffing requirements").

their intended purpose. For example, in a competitive market it is not necessary (and likely very costly) to closely oversee management, including the monitoring of directorship positions, technical developments, annual reports and specific accounting records. Marketplace forces will ensure that firms perform efficiently.[93]

The Notice also seeks comment on whether it should impose safeguards upon dominant common carriers affiliated with commercial mobile service affiliates.[94] CTIA submits that safeguards, to the extent they are applied at all, should be imposed on the dominant carrier, and not on the commercial mobile service provider.

### D. Consistent With Congressional Intent, States Petitioning To Extend Or Impose Rate Regulation Authority Bear The Burden Of Proving That Such Regulation Is Necessary

The Budget Act provides for states to regulate the rates of commercial mobile service providers in either of two limited situations. First, a state may petition for such authority and will receive it:

> if such State demonstrates that:
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> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

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[93] Moreover, § 221 (re telephone company mergers, consolidations), on its face, does not appear to apply to most, if not all, mobile services.

[94] See Notice at ¶ 64.

> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state.[95]

Second, if a state regulated rates as of June 1, 1993, it may petition the Commission within one year of enactment of the Budget Act to continue such regulation, and will receive such authority only "if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii)."[96] The Notice seeks comments on the factors that should be considered in establishing procedures to implement this provision.[97]

CTIA submits that, to properly implement Congressional intent, the state bears the burden of making the required showings in its petition. Such an interpretation is clearly required by the plain language of the statute.[98] This interpretation is also consistent with the statutory scheme. The statute provides for the FCC to make determinations as to whether continued regulation is required to protect consumers. Where the Commission has determined, as the Notice tentatively does, that regulation is not required, it is reasonable to require a petitioning State to come forward with a persuasive showing as to why the FCC's own findings should be reversed in a particular

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[95] See 47 U.S.C. § 332(c)(3)(A)(i) and (ii) (emphasis added).

[96] See 47 U.S.C. § 332(c)(3)(B).

[97] Notice at ¶ 79.

[98] See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984) ("Chevron").

locale. In the event that the FCC finds in other circumstances that federal regulation is required, then the State should still have the burden of proof but will, of course, be allowed to use FCC findings in its showing. Finally, placing the burden of proof upon the states is consistent with Congress' overall intent favoring minimal regulation.[99]

Requiring the state to bear the burden of proof is also necessary as a matter of administrative necessity and convenience. Under either alternative petitioning mechanism, the Commission must provide the public a reasonable opportunity to file responsive comments.[100] In addition, the Commission has nine months to grant or deny petitions to regulate and one year to resolve (including reconsideration) petitions to continue regulation.[101] Finally, the Commission's auction authority can be suspended if it fails to act within its statutory time limit on any petitions filed by the state within 90 days of enactment

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[99] The legislative history makes this point clear. See House Report at 261-262 (in reviewing certain petitions to regulate rates, the FCC "should be mindful of the Committee's desire to give the policies embodies [sic] in Section 332(c) an adequate opportunity to yield the benefits of increased competition and subscriber choice anticipated by the Committee."); see also Conference Report at 493-494; Markey Statement, supra ("States can regulate rates if they show that competition has not developed enough to adequately protect consumers from unjust rates.") (emphasis added).

[100] The statute does not contemplate procedures to permit the state to file reply comments in response to the public. Thus, under the plain terms of the statute, the state should be required to make the necessary showing in its petition.

[101] See 47 U.S.C. 332(c)(3)(A), (B).

of the Budget Act.[102] Considering the Commission's procedural requirements and the tight time constraints, it is imperative that the state be required to make the proper showing in its petition or be summarily dismissed for failure to make such showing.

## IV. THE COMMISSION SHOULD BE GUIDED BY THE EXPRESS TERMS OF THE STATUTE AND THE PRINCIPLE OF COMPETITIVE NECESSITY IN DECIDING INTERCONNECTION, PREEMPTION AND EQUAL ACCESS ISSUES

The Budget Act grants the Commission the authority to order common carriers to establish physical interconnections with commercial mobile service providers who make reasonable requests for such interconnections. The statute does not grant the Commission any greater interconnection authority than it already has under § 201 of the Act.[103] The Notice requests comments on various issues concerning interconnection, preemption and equal access. It tentatively concludes the following: (1) regarding commercial mobile services, a state's regulation of the right to intrastate interconnection and the right to specify the type of interconnection should be preempted; and (2) regarding PCS, a PCS provider should have a federally protected right to interconnect with LEC facilities free from state regulation.[104] It requests comment on the following: (1) whether a commercial mobile service provider's interconnection rates should be preempted from

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[102] See 47 U.S.C. § 309(j)(10)(B)(v); see also Conference Report at 488.

[103] See 47 U.S.C. § 332(c)(1)(B).

[104] Notice at ¶ 70-71, 73.

state regulation; (2) whether a commercial mobile service provider should be required to provide interconnection to other mobile service providers; and (3) and whether PCS should be obligated to provide equal access.[105]

Regarding the various issues of preemption of state regulation of interconnection for PCS and mobile services, CTIA agrees with the Commission's tentative conclusions and submits that the cellular Interconnection Order[106] provides it with the authority to preempt state regulation of a PCS or commercial mobile service provider's physical interconnection. As the Notice explains, in the Interconnection Order, the Commission concluded that it retained plenary jurisdiction over the physical plant used to interconnect local exchange carriers with cellular carriers because such interconnection was inseverable. Thus, it preempted state regulation of physical interconnections. The Commission, though, refrained from preempting intrastate regulation of the rates charged for interconnection because the interstate and intrastate portions of these rates were severable. It found that its authority to preempt the rates charged for interconnection was barred by § 2(b) of the Act[107] as interpreted

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[105] Id. at ¶ 71.

[106] See Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, Report No. CL-379, 2 FCC Rcd. 2910 (1987) ("Interconnection Order").

[107] 47 U.S.C. § 152(b). Section 152(b) reserves to the states the right to regulate the charges and facilities of common carriers engaged in intrastate telephone communications.

by relevant case law.[108] Such precedent is relevant and should be applied in this case with one exception as explained further below.

The Budget Act expressly preempts state regulation of "the rates charged by any commercial mobile service."[109] This section provides the Commission with the jurisdictional basis to preempt state regulation of the rates charged by a commercial mobile service provider. Thus, under the express terms of the statute, state regulation of a commercial mobile service provider's interconnection rates are preempted.[110] This construction will serve to foster efficiency by avoiding the imposition of patchwork costs at the various states.[111]

Regarding interconnection requirements for the commercial mobile services and equal access requirements for PCS, CTIA submits that the Commission, in making its decisions, should be guided by the principle that such requirements are only necessary in those markets where a firm possesses monopoly power. In a competitive market, consumer demand will dictate the extent of

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[108] Notice at ¶ 70. See Interconnection Order, supra, 2 FCC Rcd. at 2911-2913; See also North Carolina Utilities Comm'n v. FCC, 537 F.2d 787, 793 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986).

[109] See 47 U.S.C. § 332(c)(3)(A).

[110] Chevron, supra, 467 U.S. at 842-843.

[111] Such action is also consistent with Congressional intent. See House Report at 260 (state rate regulation of commercial mobile services is preempted to "foster the growth and development of mobile services, that, by their nature, operate without regard to state lines").

interconnection and equal access. Because the commercial mobile services are operating in a competitive environment, there is no need at this time to impose any such requirements.[112]

[112] See Hausman affidavit, supra, at 28 (survey of cellular resellers demonstrated a "lack of consumer demand for equal access provision of long distance service for their cellular usage.")

## V. CONCLUSION

For these reasons, CTIA requests that the Commission adopt a broad definition of commercial mobile services which includes all functionally similar services and subjects such services to maximum regulatory forbearance consistent with the proposals contained herein.

Respectfully submitted,

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November 8, 1993